STATE OF MICHIGAN

COURT OF APPEALS

KIMBERLEY S. RODE,

Plaintiff-Appellant,

v

HURLEY MEDICAL CENTER BOARD OF HOSPITAL MANAGERS, d/b/a HURLEY MEDICAL CENTER, HURLEY HEALTH SERVICES, LAVANYA CHERUKURI, M.D., and JAMES SANTALA,

Defendants-Appellees,

and

S. RAO GUTTA, M.D.,

Defendant.

UNPUBLISHED
December 7, 2010

No. 290872
Genesee Circuit Court
LC No. 07-085619-NH

Before: K.F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Plaintiff Kimberley Rode sustained a burn on her right forearm during hysterectomy surgery performed at defendant Hurley Medical Center. Rode's complaint asserted claims for ordinary negligence and medical malpractice, and invoked the doctrine of res ipsa loquitur in support of the medical malpractice count and several of the negligence counts. A single affidavit of merit, signed by a registered nurse practitioner, supported Rode's medical malpractice allegations. The circuit court granted summary disposition to all defendants. We affirm in part, reverse in part, and remand for further proceedings.

I. UNDERLYING FACTS AND PROCEEDINGS

On February 16, 2005, Rode underwent hysterectomy surgery performed by defendant Lavanya Cherukuri, M.D., a board-certified gynecologist, at Hurley Medical Center. Several

hours after the surgery, Rode noticed a bandage on her right forearm. Her husband removed the bandage, revealing, in Rode's words, "[a] massive burn, skin all laid back." The next day, a wound care nurse examined plaintiff's right forearm and described an "[o]pen blister, approx[imately] 2 x 1."[1] At Rode's deposition, defense counsel inquired whether Rode had talked with the wound care nurse "about what she thought might have happened to your arm[.]" Rode responded:

> She said Kim, what I believe happened, she said I believe that it's a Bovie burn, and I said what is a Bovie burn.
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> * * *
>
> She said when you are put on the operating table, she said it's a round metal table. She said there's a clamp that goes over you, it's called a bear clamp. She said they put the bear clamp over you, then they put a grounding pad on your leg. Then they turn the machine on and I guess it positions you to the spot of the operating procedure, and she said I believe there wasn't a grounding pad on your leg.

On May 10, 2005, Rode's counsel mailed to defendants Hurley Medical Center and Cherukuri a notice of intent to sue pursuant to MCL 600.2912b.[2] The notice averred that Rode's right forearm had been burned during hysterectomy surgery, and that "hospital personnel" and Cherukuri breached the applicable standards of care. On February 2, 2007, plaintiff filed a complaint in the Genesee Circuit Court naming as defendants the "Board of Hospital Managers of Hurley Medical Center D/B/A Hurley Medical Center,"[3] Hurley Health Services, Drs. Cherukuri and Gutta,[4] and James H. Santala, C.R.N.A. The complaint set forth claims for "ordinary negligence" against defendants "Hurley Hospital," Hurley Health Services, Cherukuri, Gutta and Santala, and a malpractice count against "Hurley Hospital, through the acts of its employees and agents, apparent, ostensible expressed and/or implied." Rode filed an affidavit of merit signed by Anita M. Bargardi, a registered nurse practitioner.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(7) (period of limitation), (8), and (10). They contended that plaintiff's allegations sounded in medical malpractice rather than ordinary negligence, and challenged the sufficiency of both plaintiff's notice of intent and the affidavit of merit signed by Bargardi that accompanied the complaint. In a bench ruling, the circuit court granted defendants' motions "[f]or the reasons stated both on the record and in [defendants'] briefs." The court presumably viewed plaintiff's complaint as

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[1] The nurse's note does not mention the unit of measurement she employed.

[2] Plaintiff also mailed the notice to Mohamed Akl, M.D., who is not a party to this appeal.

[3] Hurley Medical Center's answer clarified that it is properly identified as the Flint Board of Hospital Managers, d/b/a Hurley Medical Center. We refer to this defendant as Hurley Medical Center, which is a different entity than Hurley Health Services.

[4] Dr. Gutta is not a party to this appeal.

delineating claims for medical malpractice, and apparently found that her failure to file a proper notice of intent or affidavits of merit concerning each defendant inadequately set forth her claims and did not operate to toll the applicable period of limitation, which had expired.

II. NATURE OF PLAINTIFF'S CLAIM

Rode first disputes the circuit court's determination that her claims sound in medical malpractice, not ordinary negligence. This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Whether a claim sounds in ordinary negligence or medical malpractice presents a question of law subject to de novo review. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

In *Bryant*, 471 Mich at 422, the Supreme Court set forth the two "defining characteristics" of a medical malpractice clam:

> First, medical malpractice can occur only "'within the course of a professional relationship.'" [*Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999) (internal quotation omitted)]. Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id*. at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common knowledge and experience of the [fact-finder]." *Id*. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

The parties agree that Rode's claims arose within the course of a professional relationship. Regarding *Bryant*'s second prong, plaintiff asserts that because "[a]n arm should never be burned as part of a hysterectomy," her claims allege ordinary negligence.

Bryant's second inquiry directs us to examine "whether the claim raises questions of medical judgment requiring expert testimony or, on the other hand, whether it alleges facts within the realm of a jury's common knowledge and experience." 471 Mich at 423. "If the reasonableness of the health care professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence. If, on the other hand, the reasonableness of the action can be evaluated by a jury only after having been presented the standards of care pertaining to the medical issue before the jury explained by experts, a medical malpractice claim is involved." *Id*.

Rode deposed no witnesses in this case, and has not offered any explanation for her injury other than the "Bovie burn" theory advanced by the wound care nurse. In Rode's estimation, when an unconscious patient suffers an unexplained injury to a body part located far from the operative site, expert testimony should be unnecessary. Defendants respond that an operating room contains an abundance of hazards capable of causing injury, and that lay jurors

lack awareness and understanding of the potential causes for Rode's injury. As examples, defendants describe that an operative patient's arm must be secured on the operating table, cleansed with special chemicals, and punctured with an intravenous needle, and that sophisticated electrical equipment commonly used during surgery may also cause a burn. These circumstances, defendants contend, consign to experts any conclusion concerning the burn's origin.

We hold that the potential causes of the burn, the methods of its prevention, and whether it may have occurred in the absence of negligence, entail professional judgments beyond the scope of a jury's common knowledge and experience. Assuming that a Bovie caused the injury, the risks associated with use of a Bovie, and whether a burn may result with appropriate Bovie use, comprise subjects beyond the ken of lay people. Because expert testimony is necessary to explain what happened to Rode, why it happened, and whether it could have happened absent someone's negligence, her claims directly implicate medical knowledge. Consequently, Rode has stated a claim sounding in medical malpractice instead of ordinary negligence.

We reject Rode's assertion that the doctrine of res ipsa loquitur removes her allegations from the realm of medical malpractice and excuses her from complying with the statutory requirements governing medical malpractice actions. The doctrine of res ipsa loquitur "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). The doctrine's central purpose "is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id.* When applicable, res ipsa loquitur functions as an evidentiary shortcut, permitting proof by circumstantial inferences rather than direct evidence. However, this evidentiary doctrine does not transform a medical malpractice action into an ordinary negligence action.

Plaintiffs invoking the res ipsa loquitur doctrine must demonstrate the following conditions:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
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> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
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> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
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> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005) (internal quotation omitted).]

The Supreme Court emphasized in *Woodard* that whether an event does not ordinarily occur in the absence of negligence "'must either be supported by expert testimony or must be within the common understanding of the jury.'" *Id.*, quoting *Locke v Pachtman*, 446 Mich 216, 231; 521 NW2d 786 (1994). Alternatively stated, whether the res ipsa loquitur doctrine applies in a given case may depend on the presence of expert testimony establishing the first foundational element,

that the event at issue would not have occurred but for the defendant's negligence.[5] Here, Bargardi's affidavit asserts that Rode's injuries would not have occurred in the absence of negligence. Although Rode may be able to utilize the res ipsa loquitur doctrine at trial, an issue not before us, her current invocation of the doctrine cannot transform her medical malpractice allegations into an action for ordinary negligence.

III. RODE'S COMPLIANCE WITH MEDICAL MALPRACTICE PROCEDURAL REQUIREMENTS

Rode next posits that the circuit court erred by granting summary disposition on the basis of purported deficiencies attending her notice of intent to sue, MCL 600.2912b, and Bargardi's affidavit of merit, MCL 600.2912d. This Court reviews de novo questions of law regarding the statutory sufficiency of a notice of intent and an affidavit of merit. *Jackson v Detroit Med Ctr*, 278 Mich App 532, 545; 753 NW2d 635 (2008); *Vanslembrouck v Halperin*, 277 Mich App 558, 560-561; 747 NW2d 311 (2008).

A. RODE'S NOTICE OF INTENT

Rode mailed a "[n]otice of intent to file claim" to the Hurley Medical Center and Dr. Cherukuri. She neglected to send a notice of intent to sue to Hurley Health Services or C.R.N.A. Santala. Hurley Health Services and Santala urge that Rode's failure to give them notice of her claim precludes her suit against them. Rode maintains that because her complaint against Hurley Health Services and Santala set forth claims of ordinary negligence, rather than medical malpractice, she lacked any obligation to provide either a notice of intent to sue.

In MCL 600.2912b(1), the Legislature dictated that "a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced." The plaintiff's personal representative in *Bryant*, 471 Mich at 417-418, similarly asserted that all three claims pleaded in her complaint sounded in ordinary negligence instead of medical malpractice. She filed her case within the three-year period of limitation for negligence actions, but outside the two-year period applicable to medical malpractice cases. *Id*. at 432. The Supreme Court found that the plaintiff had incorrectly identified two of the claims as arising from ordinary negligence, and that the period of limitation had run as to those claims. *Id*. But rather than affirming the dismissal of the time-barred allegations, the Supreme Court held that "[t]he equities of this case . . . compel a different result[,]" *id*., reasoning as follows:

> The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*[, 460 Mich 26].

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[5] Expert testimony need not always exist before a plaintiff may invoke res ipsa loquitur; "if a medical malpractice case satisfies the requirements of the doctrine of res ipsa loquitur, then such case may proceed to the jury without expert testimony." *Id*. at 6.

> Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. MCR 7.316(A)(7). [*Id.*]

The Supreme Court highlighted that the grace afforded the plaintiff in *Bryant* would not be extended in later-filed actions: "However, in future case of this nature, in which the line between ordinary negligence and medical malpractice is not easily distinguishable, plaintiffs are advised as a matter of prudence to file their claims alternatively in medical malpractice and ordinary negligence within the applicable period of limitations." *Id*. at 432-433.

In light of *Bryant*'s admonition, we cannot excuse Rode's failure to mail a notice of intent to Hurley Health Services and Santala. That Rode averred medical malpractice against Hurley Medical Center and also filed an affidavit of merit together with her complaint, demonstrate her awareness that in this case, "the line between ordinary negligence and medical malpractice is not easily distinguishable." *Bryant*, 471 Mich at 432. Because the Supreme Court's warning in *Bryant* clearly instructed Rode to comply with the procedural requirements applicable in medical malpractice cases, we affirm the circuit court's grant of summary disposition to Hurley Health Services and Santala.

We next consider the adequacy of Rode's notice of intent to sue. Hurley Medical Center and Cherukuri characterized Rode's notice of intent as containing an insufficient recitation of the information mandated by MCL 600.2912d. Rode's notice of intent sets forth the following pertinent detail of the factual basis for her claim:

> During the operating procedures conducted on February 16, 2005, to do the hysterectomy, and while Layanya [sic] Cherukuri and Mohamed Akl were present as the operating room surgeons, the claimant's right forearm was injured resulting in a wound that appeared to be a sever [sic] burn approximately two inches in diameter; if the doctors and hospital personel [sic] in attendance during the operation had shown due care the claimant would not have suffered such a severe burn type wound to her right forearm during a hysterectomy performed on her abdomen.

The notice asserted that the relevant standard of practice "is the duty of the hospital personnel and the surgeons to exercise due care and skill, according to the practice of competent and skilled physicians and surgeons in the performance of the surgical operation and the related treatment of the claimant." Regarding the action that defendants should have taken to comply with the standard of care, the notice stated:

> All electrical equipment used during surgery should have been properly attached and monitored and all instruments used during surgery that can cause burns or other burn type wounds should have been properly monitored and used so at to not cause injuries on parts of the patient's body not associated with the surgical procedures of a hysterectomy—like the claimant's arm. …

Defendants criticize the notice for failing to differentiate between the standards of care applicable to Cherukuri and Hurley Medical Center, and not distinguishing between these entities in describing either the manner in which Cherukuri and Hurley Medical Center breached the standard of care or the actions that Cherukuri and Hurley Medical Center should have taken to achieve compliance with the standard of care.

In *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009), our Supreme Court held that a plaintiff may through amendment bring a defective notice into compliance with MCL 600.2912b(4). *Id*. at 176-178. In reaching this holding, the Supreme Court applied MCL 600.2301, which the Court viewed as "allow[ing] for amendment of errors or defects, whether the defect is in form or in substance, but only when the amendment would be 'for the furtherance of justice.'" *Id*. at 177, quoting MCL 600.2301. The Supreme Court explained that § 2301 "mandates that courts disregard errors or defects when those errors or defects do not affect the substantial rights of the parties." *Id*. Thus, the Supreme Court fashioned a two-pronged test for evaluating whether § 2301 permits a plaintiff to amend a notice of intent: "whether a substantial right of a party is implicated and, second, whether a cure is in the furtherance of justice." *Id*. The Supreme Court pointed out that because the recipients of notices of intent "are sophisticated health professionals with extensive medical background and training," a notice containing defects does not implicate their substantial rights. *Id*. at 178. With respect to the second prong, the Supreme Court concluded that the furtherance of justice portion of the test "is satisfied when a party makes a good-faith attempt to comply with the content requirements of § 2912b. Thus, only when a plaintiff has not made a good-faith attempt to comply with § 2912b(4) should a trial court consider dismissal of an action without prejudice." *Id*.

When read in its entirety, Rode's notice of intent reflects a good-faith attempt to comply with the content provisions of MCL 600.2912b. Although Rode's notice contains no specific description concerning the negligence of Hurley Medical Center "personnel," the notice does set forth an allegation that electrical equipment used in the operating room caused the burn, and that both the surgeons and "hospital personnel" bore responsibility to "exercise due care and skill" during the operation. Despite its inadequacies, the notice embodies a reasonable effort to comply with the content requirements of § 2912b. Therefore, our reading of *Bush* dictates that we afford Rode an opportunity to amend her notice of intent to bring it into full compliance with the statutory mandates. We reverse the circuit court's grant of summary disposition to Cherukuri and Hurley Medical Center to the extent that the court premised its ruling on inadequacies in Rode's notice of intent.

B. AFFIDAVIT OF MERIT

Next, we consider whether Bargardi's affidavit of merit satisfies MCL 600.2912d(1), which contemplates that a medical malpractice claimant must file "with the complaint an affidavit of merit signed by a health care professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]." Rode did not file with her complaint an affidavit of merit signed by a gynecologist; Bargardi's affidavit addresses the standard of care applicable to "health care professional practitioners" in general. In the absence of an affidavit of merit explaining the standard of care applicable to a board-certified gynecologist, Rode's complaint "was insufficient to commence plaintiff's malpractice action" against Cherukuri, and "did not toll the period of limitation." *Scarsella v Pollak*, 461 Mich 547,

550; 607 NW2d 711 (2000). Consequently, the circuit court correctly granted Cherukuri summary disposition pursuant to MCR 2.116(C)(7).

With respect to whether Bargardi's affidavit of merit sufficiently set forth a claim against Hurley Medical Center, the affidavit asserts in pertinent part:

> Mrs. Rode suffered an injury to her right forearm during abdominal surgery at Hurley Health Services (Hurley Hospital) on February 16, 2005, and ordinarily that type of injury, which appeared to be a burn, would not occur during abdominal surgery in the absence of the health care professionals in the operating room failing to perform their duties in accordance with the standard of care of their profession, or even in accordance with standards within the common understanding of laymen.
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> The only people who could have been the cause of the injury to Mrs. Rode's right arm were those people in attendance in the operating room at Hurley Hospital during the operation, and all those people appear to be employees or agents of Hurley Hospital; that is with the exception of Mrs. Rode who was unconscious and certainly could not have contributed to the cause of the injury.
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> * * *
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> From the information provided, the persons in the operating room at Hurley Hospital on February 16, 2005, including nurses, during and regarding the surgery performed on Mrs. Rode's abdomen, failed to properly use and monitor the equipment in the operating room, which was their obligation and duty.

Hurley Medical Center asserts that Bargardi's affidavit recites only "broad-brush conclusions," without ever specifically identifying the standard of care governing operating room nurses. We agree that Bargardi's affidavit lacks sufficient detail concerning the necessary components of an affidavit of merit as set forth in MCL 600.2912d(1). Specifically, the affidavit fails to identify the applicable standard of practice or care, the actions that should have been taken or omitted to achieve compliance with the standard of care, and the manner in which the breach of the standard of care proximately caused Rode's injury. See MCL 600.2912d(1)(a), (c) and (d). However, in *Kirkaldy v Rim*, 478 Mich 581, 586, 734 NW2d 201 (2007), the Supreme Court held that if a court deems an affidavit of merit deficient, the proper remedy constitutes a dismissal of the action without prejudice to afford the plaintiff "whatever time remains in the period of limitations" to file a complaint with a conforming affidavit. Because we conclude that Bargardi's affidavit of merit does not conform to the requirements of MCL 600.2912d, we order the proper remedy, a dismissal of Rode's complaint without prejudice. Rode may file a new complaint with a conforming affidavit of merit within the time remaining in the period of limitation.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher